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 DAVIC INCORPORATED dba MOBY DICK BAR

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

MICHAEL STOKES,)	Case No. 4:19-cv-05743-YGR
)	
Plaintiff,)	ANSWER TO FIRST AMENDED
)	COMPLAINT
vs.)	
)	
MOBY DICK BAR,)	
)	
Defendant.)	
)	

ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW, Defendant DAVIC INCORPORATED dba MOBY DICK BAR
 (hereinafter "Defendant"), answering the First Amended Complaint
 of Plaintiff MICHAEL STOKES (hereinafter referred to as
 "Plaintiff") alleging willful copyright infringement by responding
 as set forth below, and Defendant raises affirmative defenses as
 follows:

JURISDICTION AND VENUE

1. Defendant denies the allegations of the nature of the
 case in paragraph

2. Defendant admits this Court has subject matter
 jurisdiction over claims

arising under the Copyright Act, 17. U.S.C. §101 et seq., pursuant to 28 U.S.C. §§1331 and 1338(a), as alleged in paragraph 2.

However, Defendant denies the allegations that make up the subject claim referenced in paragraph 2 that is the subject of the First Amended Complaint.

3. Defendant admits that this Court has personal jurisdiction over Defendant because Defendant resides in and/or transacts business in California.

4. Defendant admits venue is proper in this District pursuant to 28 U.S.C. §1391(b)(1).

PARTIES

5. Answering paragraph 5 of the First Amended Complaint, Defendant lacks information sufficient to form a belief as to the facts alleged, and on that basis, Defendant denies them.

6. Answering paragraph 6 of the First Amended Complaint, Defendant admits that Davic, Inc. dba Moby Dick Bar is a domestic business corporation duly organized and existing under the laws of the State of California. However, Answering Defendant denies that Defendant's principal place of business is 4049 18th Street, San Francisco, California 94132. Defendant admits that Defendant's principal place of business is located at 4049 18th Street in San Francisco, California 94114.

STATEMENT OF FACTS

7. Answering paragraph 7 of the First Amended Complaint, Defendant lacks information sufficient to form a belief as to the facts alleged, and on that basis, Defendant denies them.

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1 8. Answering paragraph 8 of the First Amended Complaint,
 2 Defendant lacks information sufficient to form a belief as to the
 3 facts alleged, and on that basis, Defendant denies them.

4 9. Answering paragraph 9 of the First Amended Complaint,
 5 Defendant lacks information sufficient to form a belief as to the
 6 facts alleged, and on that basis, Defendant denies them.

7 **DEFENDANT'S ALLEGED INFRINGING ACTIVITIES**

8 10. Defendant denies that allegation that "Davic ran the
 9 Photographs on the Website." Defendant denies that Exhibit B to
 10 the First Amended Complaint depicts screenshots of photographs.
 11 Defendant lacks information sufficient to form a belief as to the
 12 truth of the allegations contained in the balance of Paragraph 10,
 13 that screenshots of the Photographs attached to Plaintiff's First
 14 Amended Complaint are screenshots of photographs from Defendant's
 15 website, and therefore they are deemed denied.

16 11. Defendant admits that it did not expressly license or
 17 have express permission or consent from Plaintiff to use any
 18 photographs belonging to Plaintiff on its website. However,
 19 Defendant denies that use of any photographs on its website were
 20 anything more than innocent and de minimis.

21 12. Defendant lacks information sufficient to form a belief
 22 as to the truth of the allegations contained in Paragraph 12, and
 23 therefore they are deemed denied.

24 **CLAIM FOR RELIEF**

25 **(COPYRIGHT INFRINGEMENT AGAINST DEFENDANT)**

26 **(17.S.C. §§106, 501)**

27 13. Defendant incorporate by reference its answers to the
 28 preceding Paragraphs as if set forth at length herein.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

PRAYER FOR RELIEF

WHEREFORE, Defendant denies that Plaintiff is entitled to any of the relief requested in paragraphs 1-6, and respectfully requests that the Court dismiss the First Amended Complaint in its entirety and enter judgment in its favor against Plaintiff.

DEMAND FOR JURY TRIAL

To the extent a response is required, Defendant denies that Plaintiff is entitled to a jury trial.

AFFIRMATIVE DEFENSES

Defendant hereby asserts the following Affirmative Defenses in this case:

FIRST DEFENSE

(FAILURE TO STATE A CLAIM)

1. Each of Plaintiff's causes of action, individually, fails to state facts sufficient to constitute a cause of action against the answering Defendant.

SECOND DEFENSE

(FAILURE TO MITIGATE)

2. Answering Defendant allege that Plaintiff has failed to take reasonable steps to mitigate his damages, if any.

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THIRD DEFENSE

(LACK OF MALICE OR WRONGFUL INTENT)

3. Answering Defendant allege that the actions and/or proceedings complained of by Plaintiff were made without malice or wrongful intent on the part of the answering Defendant.

FOURTH DEFENSE

(STATUTE OF LIMITATIONS)

4. Answering Defendant allege that the Plaintiff is barred by the applicable statute of limitations pursuant to 17 U.S.C. §507(b) .

SIXTH DEFENSE

(FIRST AMENDED COMPLAINT IS FRIVOLOUS AND IN BAD FAITH)

5. Answering Defendant allege that Plaintiff's first amended complaint was filed with the intention of harassing, annoying, or disturbing Defendant.

SEVENTH DEFENSE

(NO RIGHT TO RECOVERY OF ATTORNEY FEES)

6. Plaintiff did not have a copyright registration for each of the photographs alleged to be used without authorization by Defendant prior to the commencement of the alleged infringement, therefore barring Plaintiff from recovery of attorney fees.

EIGHTH DEFENSE

(FAIR USE)

7. Defendant's use of the photographs constitutes fair use.

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NINTH DEFENSE

(GOOD FAITH AND FAIR DEALING)

8. Answering Defendant allege that the actions and/or proceedings complained of by Plaintiff were conducted by Defendant in good faith.

TENTH DEFENSE

(INNOCENT INFRINGEMENT)

9. Defendant was not aware that the actions and/or proceedings complained of by Plaintiff constituted infringement of copyright work, and Defendant had no reason to believe that its actions constituted an infringement of copyright work.

ELEVENTH DEFENSE

(NO FINANCIAL BENEFIT)

10. Answering Defendant alleges that the actions and/or proceedings complained of by Plaintiff did not cause or confer a direct financial benefit to Defendant.

TWELFTH DEFENSE

(DE MINIMIS USE OF WORK)

11. Answering Defendant alleges that the actions and/or proceedings complained of by Plaintiff were considered de minimis and not significant.

THIRTEENTH DEFENSE

(ABANDONMENT)

12. Plaintiff intended to surrender rights in the alleged infringed photographs when Plaintiff dispersed the photographs on the internet.

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FOURTEENTH DEFENSE**(MISUSE OF COPYRIGHT)**

13. Plaintiff's actions constitute misuse of copyright protection.

FIFTEENTH DEFENSE**(INVALID COPYRIGHT)**

14. Plaintiff's failure to comply with the statutory formalities for obtaining a copyright registration for each of the alleged infringed upon photographs bar a claim for copyright infringement against Defendant.

SIXTEENTH DEFENSE**(FIRST SALE DOCTRINE)**

15. Plaintiff's acts of dispersing the photographs over the internet and/or transfer of the photographs precludes Plaintiff's claim for copyright infringement against Defendant.

SEVENTEENTH DEFENSE**(FAILURE TO PROVIDE NOTICE OF CEASE AND DESIST)**

16. Plaintiff's failure to provide a cease and desist notice of alleged infringing activity by Defendant is congruent with Plaintiff's intent to extract money from Defendant under the guise of purporting to enforce copyright infringement laws.

EIGHTEENTH DEFENSE**(UNCLEAN HANDS)**

17. Plaintiff's conduct with respect to the matters alleged in the First Amended Complaint to include dispersing the subject photographs over the internet with the intent to entice innocent and unknowing infringers, followed by the act of conducting a reverse image search, deprives Plaintiff of clean hands precluding Plaintiff

1 from recovery in the within action.

2 **NINETEENTH DEFENSE**

3 **(LACK OF ACTUAL DAMAGES)**

4 18. Plaintiff has not suffered any actual damages as a
5 result of the actions and/or proceedings complained of by
6 Plaintiff.

7 **TWENTIETH DEFENSE**

8 **(LACK OF ATTRIBUTABLE DAMAGES)**

9 19. Defendant did not realize any profits as a result of the
10 actions and/or proceedings complained of by Plaintiff.

11 **TWENTY-FIRST DEFENSE**

12 **(LACHES)**

13 20. Plaintiff has unreasonably delayed the commencement of the
14 within action to the substantial prejudice of the answering
15 Defendant and by reason thereof has been guilty of laches, and
16 Plaintiff is thereby precluded from recovery in the within action.

17 **TWENTY-SECOND DEFENSE**

18 **(CAUSATION)**

19 21. Answering Defendant allege that Plaintiff did not
20 contend and cannot prove any facts showing the answering
21 Defendant's conduct was the cause in fact or proximate cause of
22 any damage to Plaintiff.

23 **TWENTY-THIRD DEFENSE**

24 **(WAIVER)**

25 22. Plaintiff waived his right to the relief sought by
26 virtue of Plaintiff's acts, conduct, representations, and
27 omissions.

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TWENTY-FOURTH DEFENSE**(SPECULATIVE DAMAGES)**

23. Answering Defendant asserts that Plaintiff did not plead and cannot prove any facts showing Plaintiff suffered any alleged special damages. All damages alleged by Plaintiff are uncertain, speculative, and therefore are unrecoverable in each cause of action.

TWENTY-FIFTY DEFENSE**(ESTOPPEL)**

24. Answering Defendant asserts that the Plaintiff engaged in conduct and activity with respect to the subject of this litigation which are the subject of Plaintiff's First Amended Complaint, and by reason of said conduct and activities are estopped from asserting any claims for damages or seeking any other relief against this answering Defendant.

WHEREFORE, answering Defendant DAVIC INCORPORATED dba MOBY DICK BAR pray for this Honorable Court for the following relief:

1. For dismissal of the Plaintiff's action with prejudice;
2. For an order that Plaintiff shall take no relief by way of the First Amended Complaint;
3. For an award of Defendant's costs and attorneys' fees herein incurred;
4. That judgment be entered in favor of Defendant;
5. For such other and further relief as the Court may deem fair and just.

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1 RESPECTFULLY SUBMITTED

2 Dated: November 27, 2019

BREMER WHYTE BROWN & O'MEARA LLP

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By: 

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Alex M. Giannetto
Darlene M. McIver
Attorneys for Defendant
DAVIC INCORPORATED dba MOBY
DICK BAR

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